

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 17, 2007

RODNEY BUFORD v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County

No. 2003-C-2109 Mark J. Fishburn, Judge

No. M2006-02750-CCA-R3-PC - Filed November 20, 2007

A jury convicted Petitioner of especially aggravated robbery and aggravated burglary. Petitioner's appeal to this Court was unsuccessful. Petitioner filed a pro se petition for post-conviction relief which the post-conviction court summarily dismissed for failure to state a colorable claim. The State concedes that Petitioner did state a colorable claim, and we agree. Therefore, we reverse the post-conviction court's summary dismissal and remand for further proceedings in accordance with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Reversed and Remanded.

JERRY L. SMITH, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Rodney Buford, Jr., Pro Se, Only, Tennessee.

Robert E. Cooper, Jr., Attorney General & Reporter; Lacy Wilbur, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Kathy Morante, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

A Davidson County jury convicted Petitioner of especially aggravated robbery and aggravated burglary. The trial court sentenced Petitioner to twenty-five years for the robbery and six years for the burglary to be served consecutively. Petitioner appealed his conviction and his

sentence to this Court. *State v. Rodney Buford*, No. M2004-01568-CCA-R3-CD, 2005 WL 2333616, (Tenn. Crim. App., at Nashville, Sept. 22, 2005), *perm. app. denied* (Tenn. Feb. 21, 2006).

Petitioner filed a pro se petition for post-conviction relief on October 17, 2006. In an order filed November 14, 2006, the post-conviction court summarily dismissed the petition on the basis that Petitioner “failed to set forth allegations of fact supporting the arguments in the petition.” Petitioner filed a timely notice of appeal.

ANALYSIS

Petitioner argues on appeal that the post-conviction court erred in dismissing his petition. The State concedes that the post-conviction court erred in dismissing the petition and requests this Court to remand this case to the post-conviction court. We conclude that it was indeed error on the part of the lower court to summarily dismiss the petition.

The dismissal of the petition by the post-conviction court is an issue of law, therefore, this Court conducts a de novo review without a presumption of correctness. *See Burnett v. State*, 92 S.W.3d 403, 406 (Tenn. 2002) (citing *Fields v. State*, 40 S.W.3d 450, 457 (Tenn. 2001)).

T.C.A. § 40-30-106 sets out the preliminary considerations for a post-conviction court upon receiving a petition for post-conviction relief. T.C.A. § 40-30-106 states as follows:

(d) The petition must contain a clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings. Failure to state a factual basis for the grounds alleged shall result in immediate dismissal of the petition. If, however, the petition was filed pro se, the judge may enter an order stating that the petitioner must file an amended petition that complies with this section within fifteen (15) days or the petition will be dismissed.

(e) If a petition amended in accordance with subsection (d) is incomplete, the court shall determine whether the petitioner is indigent and in need of counsel. The court may appoint counsel and enter a preliminary order if necessary to secure the filing of a complete petition. Counsel may file an amended petition within thirty (30) days of appointment.

(f) Upon receipt of a petition in proper form, or upon receipt of an amended petition, the court shall examine the allegations of fact in the petition. If the facts alleged, taken as true, fail to show that the petitioner is entitled to relief or fail to show that the claims for relief have not been waived or previously determined, the petition shall be dismissed. The order of dismissal shall set forth the court’s conclusions of law.

T.C.A. § 40-30-106(d)-(f). A petition presents a “colorable claim,” when the claim ““if taken as true, in the light most favorable to petitioner, would entitle petitioner to relief under the Post-Conviction Act.”” *Arnold v. State*, 143 S.W.3d 784, 786 (Tenn. 2004) (quoting Tenn. Sup. Ct. R. 28, § 2(H)). T.C.A. § 40-30-103 states, “[r]elief under this part shall be granted when the conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.”

The State concedes that Petitioner did state a colorable claim and alleged facts to support his claim in his petition. In his petition, Petitioner alleged that he was afforded ineffective assistance of counsel because: (1) trial counsel did not attempt to suppress his confession based upon the fact that he was under the influence of illegal drugs; (2) trial counsel did not obtain expert medical testimony to refute the assertion that the victim suffered serious bodily injury; (3) trial counsel conceded Petitioner’s guilt in the opening statement despite the fact that Petitioner pled not guilty; and (4) trial counsel stated in opening argument that he was going to call witnesses on Petitioner’s behalf, but failed to do so.

In *Swanson v. State*, 749 S.W.2d 731 (Tenn. 1988), our supreme court stated, “a *pro se* petition under the [Post-conviction] Act is ‘held to less stringent standards than formal pleadings drafted by lawyers, and the test is whether it appears beyond doubt that the [petitioner] can prove no set of facts in support of his claim which would entitle him to relief.’” 749 S.W.2d at 734 (quoting *Baxter v. Rose*, 523 S.W.2d 930, 939 (Tenn. 1975) (citation omitted)). We conclude that when Petitioner’s allegations are taken in a light most favorable to Petitioner, he would be entitled to relief.

Therefore, we remand this case to the post-conviction court to appoint counsel for Petitioner and hold an evidentiary hearing as required under the Post-Conviction Act.

CONCLUSION

For the foregoing reasons, we reverse the decision of the post-conviction court and remand for further proceedings in accordance with this opinion.

JERRY L. SMITH, JUDGE